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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92053501
Party	Defendant Del Taco, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

CHRISTIAN M. ZIEBARTH,

Petitioner,

vs.

DEL TACO LLC

Respondent.

Reg. No. 1,043,729
Cancellation No. 92053501

RESPONDENT DEL TACO LLC'S MOTION TO STRIKE
OR IN THE ALTERNATIVE TO DISMISS

Pursuant to Sections 539 and 801.05 of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") and pursuant to the Board's Orders dated December 12, 2012 and August 12, 2013 (Doc. Nos. 33 and 49), Respondent Del Taco LLC ("Del Taco"), by its counsel, hereby moves to strike the Declaration of Kelly K. Pfeiffer and Exhibit A attached thereto (the "Declaration") filed as evidentiary matter with Petitioner Christian M. Ziebarth's ("Petitioner") Reply Brief (Doc Nos. 93-94). Del Taco further moves to strike all portions of Petitioner's Reply Brief referencing and quoting the Declaration. The Declaration and all portions of Petitioner's Reply Brief referencing the Declaration are improper and were not properly made of record and therefore should be stricken in their entirety. In the alternative, Del Taco moves to dismiss the proceeding on the grounds of Petitioner's ongoing, repeated and willful discovery violations and violations of the Board's Orders dated December 12, 2012 and August 12, 2013 (Doc. Nos. 33 and 49) in this proceeding under Section 527.03 of the TBMP. The grounds for this motion are set forth below.

BRIEF IN SUPPORT

The TBMP is expressly clear that evidence may not be submitted with a brief unless it was properly made of record during the testimony period of the offering party. See TBMP § 539. Further, “[i]f evidentiary material not of record is attached to a brief on the case, an adverse party may object thereto by motion to strike or otherwise.” *Id.*; see also TBMP § 801.05; *Plus Products v. Physicians Formula Cosmetics, Inc.*, 198 USPQ 111, 112 n.3 (TTAB 1978) (applicant’s exhibits attached to its brief cannot be considered); *Angelica Corp. v. Collins & Aikman Corp.*, 192 USPQ 387, 391 n.10 (TTAB 1976) (“Evidence submitted by opposer for the first time with its brief has not been considered because it was not regularly made of record during its testimony period in chief or rebuttal testimony period”).

In this proceeding, Petitioner has improperly introduced both testimony and evidence in his Reply Brief that were not properly made of record during Petitioner’s testimony period. Therefore, under the plain wording of TMBP § 539 and 801.05, the Declaration and all portions of Petitioner’s Reply Brief referring to or quoting the Declaration should be stricken in their entirety.

The Declaration is also clearly improper under the express Orders of the Board on December 12, 2012 (Doc No. 33) (“December Sanctions Order”) and on August 12, 2013 (Doc. No. 49) (“August Sanctions Order”). In the December Sanctions Order the Board specifically stated that Petitioner was “bound by [his] responses to [Del Taco’s] discovery requests” and ordered Del Taco to “notify the Board in [Del Taco’s] brief if petitioner’s evidence and argument at trial exceed the information provided during discovery.” See December Sanctions Order, pg. 9 (emphasis added). The Board further explicitly emphasized in its Order that Del Taco should only raise objections to Petitioner exceeding

the bounds of discovery in his evidence and arguments at trial in Del Taco's brief on the case. See August Sanctions Order, pg. 2 (emphasis added).

In full compliance with the Board's rulings and instruction in the December Sanctions Order and the August Sanctions Order in its Trial Brief, Del Taco timely raised its objections regarding the admission by Petitioner as to the withholding of documents in discovery that Petitioner later attempted to introduce and rely upon in his Trial Brief. See Doc Nos. 91-92, Appendix A. In so making these objections Del Taco relied only on testimony that was properly of record from the cross-examination of Petitioner himself. *Id.*

In response, Petitioner now attempts to introduce not only the testimony of his counsel, but shockingly actually attaches copies of some of the very emails Petitioner deliberately and admittedly withheld from discovery, including emails between Petitioner and a gentleman named Jeff Naugles. See Exhibit A to Declaration of Kelly K. Pfeiffer attached to Reply Brief. These emails supposedly between Petitioner and Mr. Jeff Naugle discuss recipes and an alleged meeting. *Id.* There is no question that had these emails been produced in discovery, as they should have been, that Del Taco would have inquired further as to these emails and a deposition of Jeff Naugle. These emails comprise some of the very evidence the Board held in its December and August Sanctions Orders that Petitioner could not introduce in this proceeding.

Petitioner's characterization of his brazen violation of the December Sanctions Order in his Reply Brief as a defense to the timely and proper objections of Del Taco is disingenuous at best. As such, Petitioner's introduction of these emails into evidence as part of his Reply Brief is deliberately and knowingly improper under the clear wording of the December Sanctions Order, as well as the clear applicable rules in the TBMP.

Accordingly, Petitioner's introduction of the Declaration and all portions of his Reply Brief referring to or quoting the Declaration should be stricken both under Sections 539 and

801.05 of the TBMP as well as under the express wording of the December Sanctions Order and August Sanctions Order. In the alternative, due to Petitioner's repeated discovery violations and most recent clear violation of the Board's December and August Sanctions Orders, Del Taco respectfully submits that Petitioner's intentional, knowing and ongoing willful disregard of the rules of procedure and this Board's previous Orders are such that the Board should dismiss this entire proceeding with prejudice against Petitioner under Section 527.03 of the TBMP.

Dated: **October 23, 2014**

/ April L Besl /

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent by certified first-class mail, on this 23rd day of October, 2014, to Kelly K. Pfeiffer, Amezcua-Moll Associations PC, Lincoln Professional Center, 1122 E. Lincoln Ave. Suite 203, Orange, CA 92865.

/ April L Besl /

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